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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLICAN CAUCUS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
(Intervenor for a Limited Purpose in the District Court),
Petitioner,

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

v.

RICHARD VIETH, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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SEPTEMBER 10, 2003

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QUESTIONS PRESENTED

1. Whether the common law legislative privilege operates to prohibit the discovery of information from a non-party who is, or had been, assisting members of the state legislature in evaluating information in connection with the legislative task of redistricting.

2. Whether where a non-party produces documents related to legitimate legislative activity, in compliance with a subpoena *duces tecum*, but (a) destruction of the documents would vindicate the important interests underlying the privilege, and/or (b) resolution of a related appeal by this Court could lead to further proceedings on remand and, in turn, either use of the documents or additional discovery related to the redistricting process, an appeal from the denial of an objection to the subpoena based on the legislative privilege is not moot.

LIST OF PARTIES

Petitioner is the Republican Caucus of the Pennsylvania House of Representatives ("House Republican Caucus" or "Caucus"). The Caucus intervened in the proceedings below before a three-judge district court for the limited purpose of seeking to quash a subpoena issued by the plaintiffs in the underlying litigation involving a challenge to the congressional redistricting plan enacted in Pennsylvania following the 2000 decennial census.

Respondents, who are also Plaintiffs in the underlying redistricting litigation and Appellants in *Vieth v. Jubelirer*, No. 02-1580, before this Court (*see* 123 S. Ct. 2652 (June 27, 2003 (probable jurisdiction noted)), are Richard and Norma Jean Vieth and Susan Furey.

Other parties to the underlying litigation include Edward G. Rendell, in his official capacity as Governor of Pennsylvania; Catherine Baker Knoll, in her official capacity as Lieutenant Governor of the Commonwealth, Pedro A. Cortés, in his official capacity as Secretary of the Commonwealth of Pennsylvania; Monna J. Accurti, in her official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State ("Executive Officers"); and Robert C. Jubelirer, in his official capacity as President *pro tempore* of the Pennsylvania Senate; and John M. Perzel, in his official capacity as Speaker of the Pennsylvania House of Representatives ("Presiding Officers"). Executive Officers and Presiding Officers are presently the Appellees in *Vieth v. Jubelirer*, No. 02-1580.

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PETITION FOR WRIT OF CERTIORARI

Petitioner House Republican Caucus respectfully requests that a writ of *certiorari* issue expeditiously to review the judgment of the United States Court of Appeals for the Third Circuit and that the same be consolidated with *Vieth v. Jubelirer*, No. 02-1580 (hereinafter "*Vieth*") (presently being briefed and scheduled for oral argument in January 2004), in which this Court will consider the justiciability and assessment of a partisan gerrymandering challenge to a congressional redistricting plan. The legislative privilege question presented in this case, as review of Appellants' brief in *Vieth* shows, is intimately intertwined with the questions presented in *Vieth* and should be addressed simultaneously so that the Court can assess the full ramifications of any resolution of *Vieth*.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit in *Vieth v. Commonwealth of Pennsylvania*, No. 02-1580 (May 9, 2003) (Becker, Barry and Bright (sitting by designation), C.J.) (Appendix A) is not officially reported. It is, however, available on LEXIS at 2003 U.S. App. LEXIS 8831. The order of a single judge of the three-judge court (Rambo, D.J.) (Appendix B), from which the initial appeal was taken, is also not reported.

JURISDICTION

The underlying opinion and order of the Court of Appeals was filed on May 9, 2003. Appendix A. On June 12, 2003, the Court of Appeals denied the petition for rehearing with suggestion for rehearing *en banc* submitted by the Caucus (Appendix C). This Petition is filed within

90 days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions directly involved in this matter. The underlying redistricting litigation involved constitutional challenges to the congressional redistricting plans in Act No. 2002-1 and Act No. 2002-34, which were enacted by the Pennsylvania General Assembly after receipt of the 2000 decennial census data.

STATEMENT OF THE CASE

A. The Underlying Litigation

As a result of reapportionment following the 2000 decennial census, the Commonwealth of Pennsylvania lost two seats in the U.S. House of Representatives (going from 21 to 19). The Pennsylvania General Assembly adopted a congressional redistricting plan, which was signed into law on January 7, 2002 as part of Act No. 2002-1 ("Act 1").

On January 11, 2002, Respondents (Plaintiffs below and Appellants in *Vieth*) filed an amended complaint seeking declaratory and injunctive relief in the United States District Court for the Middle District of Pennsylvania. They alleged, *inter alia*, that the Act 1 plan constituted an unconstitutional partisan gerrymander and that it violated the one-person, one-vote principle. A three-judge court was convened pursuant to 28 U.S.C. §2284(a).

On February 22, 2002, the three-judge court dismissed for failure to state a claim all counts of the amended complaint except that premised on the one-person, one-vote principle. *See Vieth v. Commonwealth,* 188 F. Supp.2d 532 (M.D. Pa.), *appeals dismissed*, 123 S. Ct. 68 (Oct. 7, 2002)

(Nos. 01-1873 and No. 02-135). After a hearing, the three-judge court, on April 8, 2002, issued an order and opinion in which it (1) held that the Act 1 plan violated the one-person, one-vote principle,[1] (2) enjoined the use of the Act 1 plan, and (3) gave the General Assembly until April 29, 2002 to provide it with a plan remedying the violation. *See Vieth v. Commonwealth,* 195 F. Supp.2d 672 (M.D. Pa.), *appeals dismissed*, 123 S. Ct. 67 (Oct. 7, 2002), 123 S. Ct. 68 (Oct. 7, 2002) (Nos. 01-1817 and 01-1823).

The General Assembly adopted a revised plan, with a "zero" population deviation, which was signed into law on April 17, 2002 as part of Act No. 2002-34 ("Act 34"). Plaintiffs immediately challenged the Act 34 plan as an unconstitutional partisan gerrymander and as violative of the one-person, one-vote principle. On April 23, 2002, the three-judge court stayed its injunction of the Act 1 plan and permitted it to be used for the 2002 congressional elections.

On January 24, 2003, the three-judge court upheld the constitutionality of the Act 34 plan. *Vieth v. Commonwealth of Pennsylvania*, 241 F. Supp.2d 478 (M.D. Pa. 2003). Plaintiffs took a direct appeal from that portion of the three-judge court's opinion dismissing the partisan gerrymandering challenge to Act 34 for failure to state a claim. On June 27, 2003, this Court noted probable jurisdiction. *Vieth v. Jubelirer* (No. 02-1580), 123 S. Ct. 2652. Plaintiffs/Appellants submitted their brief on the merits in *Vieth* to this Court on August 29, 2003.

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[1] The plan had a 19-person deviation between the largest and smallest congressional district, which was found not to be justified.

B. The Subpoena and Related Proceedings

In early February 2002, Plaintiffs served a subpoena *duces tecum* ("subpoena") on the Custodian of Records of Carnegie Mellon University ("CMU"), asking for production of a contract between CMU and the Caucus and related documents. The subpoena sought production of:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including requests for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

Appendix A at 3a-4a.

Presiding Officers moved to quash the subpoena or for a protective order. Presiding Officers argued, *inter alia*, that a protective order should issue to prohibit the discovery as violative of the common-law legislative privilege. The Caucus moved to intervene for the limited purpose of joining Presiding Officers' motion. A single judge of the three-judge court ordered a temporary stay of the subpoena pending further order.

The single judge thereafter granted the motion of the Caucus to intervene but, by separate order, denied the motion to quash the subpoena or for protective order.

Appendix B. The Caucus immediately moved for a stay pending appeal. However, before the stay motion was ruled upon, the Caucus's contractor produced the documents, so the motion was withdrawn.

The Caucus appealed the decision of the single judge to the United States Court of Appeals for the Third Circuit.[2] On May 9, 2003, a panel of the Court of Appeals dismissed the appeal as moot. Appendix A.

Mootness was an issue because the contractor had produced the documents. Appendix A at 6a. The panel first rejected the Caucus' argument that the case was not moot because "conceivably" this Court could note probable

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[2] The Court of Appeals initially identified a possible jurisdictional defect in the appeal and requested letter briefs addressing whether this Court pursuant to 28 U.S.C. §1253, as opposed to it, had appellate jurisdiction. The Caucus detailed the basis for the Court of Appeals' jurisdiction in a letter brief to that court and also filed a timely protective appeal to this Court (No. 01-1713). In the supporting Jurisdictional Statement filed before this Court, the Caucus explained that Section 1253 *did not* apply and urged the Court to, *inter alia*, dismiss the appeal for lack of jurisdiction so as to clarify the correct procedural route for appeal.

On October 7, 2002, this Court dismissed the appeal for want of jurisdiction. *Republican Caucus of the Pennsylvania House of Representatives v. Vieth*, 123 S. Ct. 67 (Oct. 7, 2002).

On January 24, 2003, the three-judge court below upheld the constitutionality of the Act 34 plan. In March 2003, the Court of Appeals inquired as to whether the Caucus would pursue its appeal. Counsel answered yes and confirmed this response in a letter, which specifically referenced the pending appeal before this Court in *Vieth* (filed February 24, 2003). Counsel also noted that the issue of legislative privilege in connection with non-parties and discovery was one repeatedly encountered by the Caucus.

jurisdiction in *Vieth*. The panel reasoned that "[s]hould the case be remanded, and should a dispute then arise over the evidentiary use of the documents [produced], that dispute will be for the three-judge panel to resolve in the first instance." *Id.* at 7a (citation omitted).

The panel next rejected the Caucus' argument that the case was not moot because the court could still, as in *Church of Scientology of California v. United States*, 506 U.S 9, 12-13 (1992) (emphasis in the original), "fashion *some* form of meaningful relief." The panel reasoned that it need not engage in the *Church of Scientology* analysis where the Caucus did not (as had the appellants in *Church of Scientology*) assert a privacy or possessory interest. Appendix A at 9a.

Finally, the panel refused to apply the "capable of repetition, yet evading review" exception to mootness. *Id.* at 10a-11a. Its reasoning suggests that the Court of Appeals did not see the grant of probable jurisdiction in *Vieth* and potential remand as a realistic possibility (perhaps in light of this Court's summary affirmance in *O'Lear v. Miller*, 222 F. Supp.2d 850 (E.D. Mich.), *aff'd*, 123 S. Ct. 512 (2002)). The panel reasoned: "As for this case, there is no more than a theoretical possibility that CMU will again be subpoenaed and ordered to produce documents relating to the work it did on the 2000 census." Appendix A at 10a.

The Caucus timely filed a petition for rehearing with suggestion for rehearing *en banc*. The petition was denied on June 12, 2003 (fifteen days before this Court noted probable jurisdiction in *Vieth*). Appendix C.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THIS CASE INVOLVES AN ISSUE OF NATIONAL IMPORTANCE

A. Partisan Gerrymandering and Proving the Intent of a State Legislature

Having noted probable jurisdiction in *Vieth,* this Court will shortly consider the justiciability and assessment of a claim that a state legislature has engaged in partisan gerrymandering in connection with the enactment of a congressional redistricting plan. The *Vieth* appeal raises issues of national importance, implicating the very foundations of the American system of government. Any resolution of *Vieth* by this Court will impact the American people, the legislatures in all fifty states, Congress, the federal and state judiciary and the relationship among them all. To give the weighty issues involved in *Vieth* the full consideration they deserve, the Court must be cognizant of all of the interests involved. One such interest – the interest of a state legislature in the integrity of the legislative process – is at the heart of *this* case.

Appellants in *Vieth* sought the discovery at issue here and expressly refer to the documents released over the objection of the Caucus in their brief on the merits, *see Vieth v. Jubelirer*, No. 02-1580, Brief of Appellants at 12 ("Pennsylvania legislators, armed with the supercomputer facilities at Carnegie Mellon University, sacrificed every traditional districting method") (emphasis added)). They ask this Court to invalidate partisan gerrymandering which "thwarts majority rule" in violation of U.S. CONST. art. I, §§2 and 4 and the Fourteenth Amendment. Appellants in *Vieth* urge the Court to either (1) definitively interpret the Court's decision in *Davis v. Bandemer*, 478 U.S. 109

(1986), in a way that repudiates the interpretation given to it by all lower courts and clarify that *Bandemer* outlaws the conduct alleged; (2) replace *Bandemer* with a standard for assessing partisan gerrymandering claims crafted by the Appellants in *Vieth*; or (3) develop a new standard to assess partisan gerrymandering that is "faithful to the Framers' vision of majority rule." Brief of Appellants at 3-4, 19-20 & 41.

Critically, the standard promoted by the Appellants in *Vieth* to replace the standard established by the plurality in *Bandemer* assigns a central role to proving the intent of a state legislature in enacting a congressional redistricting plan:

> To demonstrate unconstitutional partisan gerrymandering, plaintiffs must make two showings: *First*, plaintiffs must show that the mapmakers acted with a predominant intent to achieve partisan advantage. That can be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage. ... *Second*, sufficient partisan effects are established if [citing proposed standards].

Brief of Appellants at 19-20 (emphasis in italics original, emphasis in underlining added). *See also id.* at 32 ("Direct evidence of excessive partisanship can be critical because, as political scientists have long recognized, some partisan gerrymanders can be highly effective without generating ugly maps.") (internal citation omitted). Numerous *amicus curiae* also advocate that the Court focus heavily on intent in establishing a standard to assess partisan gerrymandering claims. *See e.g.*, Brief of *Amici Curiae* Texas House

Democratic Caucus et al. in Support of Appellants at 20-21.

Intent is an element of the standard enunciated by the plurality in *Bandemer*. *See* 478 U.S. at 127 ("in order to succeed [on their claim for partisan gerrymandering], the [] plaintiffs were required to prove both intentional discrimination against an identifiable group and an actual discriminatory effect on that group").

Thus, should this Court ultimately reaffirm the plurality standard in *Bandemer* or tweak the *Bandemer* standard without dropping the intent element or adopt Appellants' proposed standard and thereby make intent a central element of the partisan gerrymandering analysis, a thorny problem of proof is created which directly implicates the legislative privilege.

B. The Privilege Involved

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized a common law legislative immunity for state legislators that protects them, *absolutely*, from liability for actions undertaken "in the sphere of legitimate legislative activity." *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of the common law legislative immunity and clarifying its extension to local legislators).

The federal Speech or Debate Clause, which provides immunity for federal legislators, was but a "reflection of political principles already firmly established in the States." *Tenney*, 341 U.S. at 373. The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, §6.

Common law legislative immunity is co-extensive in federal civil matters with that provided members of Congress under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980).[3]

Legislative immunity is intended "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). As explained in *Tenney*, "'[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.'" 341 U.S. at 373 (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896) at 38); *see also Bogan*, 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference"). "[T]he privilege was not born primarily of a desire to avoid private suits ... but rather to prevent intimidation by the executive and accountability before a

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[3] While this Court held in *United States v. Gillock*, 445 U.S. 360 (1980), that the common law legislative privilege did not bar the introduction of evidence concerning a state legislator's support of legislation in a federal criminal action for bribery, this Court has not extended the *Gillock* rationale to civil matters involving state legislators and assertion of the privilege. Notably, *Supreme Court of Virginia* was decided less than three months after *Gillock* and the *Tenney* decision was reaffirmed in *Bogan*. To the extent, moreover, that *Gillock* may be read as a limitation on the viability and scope of the common law legislative privilege, recent decisions of this Court undermine the *Gillock* Court's reasoning. *See e.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

possibly hostile judiciary." *Helstoski*, 442 U.S. at 491 (quoting *United States v. Johnson*, 383 U.S. 169, 180-81 (1966)) (emphasis added).[4]

Tenney and subsequent cases recognize that the privilege operates to protect the process by which legislation is developed, as opposed to the interests of an individual legislator. The *Tenney* Court's explanation of why the privilege cannot be easily defeated shows this:

> We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. ... The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. ... The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377 (emphasis added); *see also Fletcher v. Peck*, 6 Cranch 87, 130-31 (1810) (explaining that it not consonant with our scheme of government for a court to inquire into the motives of legislators); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("[i]nquiries into Congressional motives or purposes are a hazardous matter").

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[4] Presiding Officers in *Vieth* will argue that the constitutional principles girding the legislative privilege are one consideration militating in favor of finding partisan gerrymandering claims to be nonjusticiable.

The absolute legislative immunity recognized in *Tenney* extends beyond protection from liability and the right to be dismissed as a defendant from civil suit. It also provides legislators with protection from "the burden of defending themselves when engaged 'in the sphere of legitimate legislative activity.'" *Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). A legislator cannot be questioned concerning legislative activities. *See Gravel v. United States*, 408 U.S. 606, 616, 629 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting") (emphasis added).

Drawing on *Dombrowski* and *Gravel*, various Courts of Appeals have recognized that the immunity operates not only as immunity from suit, but also as a privilege that protects legislators, and others performing legislative activities, from questioning in any context, including discovery. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (allowing former congressman, as non-party deponent, to refuse to answer questions concerning his activities while a legislator); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (affirming decision to quash subpoenas issued to custodian of records and congressional subcommittee staff director for information and documents in the subcommittee's possession); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (affirming decision to quash subpoenas, issued to two members of a congressional subcommittee, for documents stolen from a law firm and provided to the subcommittee); *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (noting, in providing instructions on remand, that plaintiff would have to present the case without testimony of board members who abolished plaintiff's job). This legislative privilege (sometimes

referred to as the "testimonial strand" of legislative immunity) ensures that the legislative process is, for the good of the public, protected from disruption.[5]

C. Thorny Problems of Proof

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Bogan*, 523 U.S. at 54-55 (quoting *Tenney*, 341 U.S. at 377). Civil discovery that seeks information related to actions taken in the sphere of legitimate legislative activity should accordingly be prohibited.

Redistricting is a legislative process. *See* U.S. CONST. art. I, §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ..."). *See also Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("legislative reapportionment is primarily a matter for

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[5] This issue – the application of legislative immunity to prohibit certain discovery – was raised as an issue of first impression in the Court of Appeals. It was not addressed by that court, which avoided the issue by dismissing the appeal as moot. *See* Appendix A. Assertion of the privilege is premised on decisions in the Courts of Appeals in the Fourth, Ninth and District of Columbia Circuits (and other lower courts), which draw upon this Court's decisions in *Dombrowksi* and *Gravel* to interpret the privilege as protecting legislators, and anyone performing legislative functions, from questioning in a discovery context.

legislative consideration and determination"). The process of enacting legislation, including the investigation and evaluation done before a bill is introduced, is legislative activity. *See Doe v. McMillan*, 412 U.S. 306, 313 (1973) (explaining that authorizing an investigation, holding hearings and preparing a report are all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to consideration and passage or rejection of proposed legislation"). Where a legislator or the legislative body hires an assistant (such as the contractor in this case) to aid in the completion of specific legislative tasks, the legislative privilege can be asserted to protect any information related to that task in the hands of the assistant. *See Gravel*, 408 U.S. at 616-617 ("[I]t is literally impossible, in view of the complexities of the modern legislative process ... for Members ... to perform their legislative tasks without the help of aides and assistants; ... the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos").[6]

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[6] Lower federal courts have applied the privilege to prevent discovery in connection with redistricting litigation. *See Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578, 582 n.2 (E.D. Pa.), *aff'd*, 459 U.S. 801 (1982) (noting that "prior to trial, the deposition which plaintiffs sought of [the Commission Chairman] was made subject to a protective order by reason of legislative immunity"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (three-judge court) (applying the privilege to partially bar discovery in challenge to state legislative redistricting); *Simpson v. City of Hampton*, 166 F.R.D. 16 (E.D. Va. 1996) (applying privilege to prohibit discovery in challenge to councilmanic redistricting plan); *Martinez v. Bush*, No. 02-20244-Civ-Jordan (S.D. Fla., Mem. Op. July 12, 2002) (three-judge court) (applying privilege to bar discovery of legislators in challenge to congressional

Allowing a showing of intent for a partisan gerrymandering claim, through evidence of the internal operations of legislators and their agents, conflicts with the important constitutional principles animating the legislative privilege. As this Court has acknowledged, "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," and therefore "[p]lacing a decision-maker on the stand is [] 'usually to be avoided.'" *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977). *See also id.* at 268 (noting that where legislators might be called to testify "such testimony frequently will be barred by privilege") (citing, *inter alia*, *Tenney*); *Miller v. Johnson*, 515 U.S. 900 915-916 (1995) (acknowledging the "evidentiary difficulty" in the context of a racial gerrymandering challenge to a congressional redistricting plan, and instructing courts to recognize the "intrusive potential of judicial intervention into the legislative realm when

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redistricting and explaining, "[d]ecision-making regarding the implementation of processes leading up to redistricting ...qualifies as [legislative] activity."); *see also Deem v. Manchin*, No. 3:01cv75 (N.D. Va., Mem. Order Dec. 27, 2001) (referring to previous ruling barring deposition of state senators in challenge to state legislative redistricting). Other lower courts, however, have misapplied the privilege to some extent. *See Cano v. Davis*, 193 F. Supp.2d 1177 (C.D. Cal. 2002) (three-judge court) (rejecting application of the privilege in part in equal protection challenge to select state and congressional districts); *Rodriguez v. Pataki*, 2003 U.S. Dist. LEXIS 12911 (S.D. N.Y. 2003) (decision of magistrate judge denying state legislators' objection based on legislative privilege to discovery into activity of statutorily-created advisory committee on demographic research and reapportionment in context of challenge to state and congressional redistricting plan). This divergence of authority among the lower federal courts also militates in favor of granting the Petition for Writ of Certiorari.

assessing ... the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed.").

It is, moreover, difficult to divine the intent of a multi-member body and concomitantly inappropriate to ascribe the stated motivations of individual legislators to an entire body. *See O'Brien*, 391 U.S. at 383-84 ("Inquiries into congressional motives or purposes are a hazardous matter. ... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

Yet the subpoena for documents that was issued below could have been followed, under the same rationale, by a subpoena for depositions or for trial testimony by any of the 253 members of the Pennsylvania General Assembly. A replay of the legislative debate on the political task of congressional redistricting might well have been played out in testimony given in court.

Should the Court rule on the standard for partisan gerrymandering in *Vieth*, it should also address the contours of the legislative privilege in order to either avoid, or to offer guidance upon, the complicated issues of proof that will accompany future litigation. Granting the petition for writ of certiorari in this case and consolidating it with *Vieth* will allow the Court to consider all pertinent issues at once.

D. Beyond Redistricting: Recurring Issues

While the redistricting context in which it arose here places application of the common law legislative privilege to civil discovery in perhaps its sharpest relief, the issue is

one whose importance transcends the present situation. Whenever it arises, the issue implicates the independence of state legislators and legislatures, the integrity of the legislative process and the ability of legislative bodies to protect their interests in litigation that threatens to impact upon the accomplishment of legislative duties.

The Caucus does not contend that intent of the legislature cannot be considered when the judiciary construes statutes. Indeed, the intent of the legislature is central to statutory construction. But the techniques of statutory construction do not include, and should not be expanded to include, discovery and use of non-public information about the internal operations, discussions and considerations of legislators and legislative bodies. There is a real threat that the ruling below will facilitate this inappropriate approach to statutory construction.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT ON PRINCIPLES OF MOOTNESS

The Court of Appeals' decision dismissing the appeal of the House Republican Caucus for mootness ran afoul of legal principles long accepted by this Court. The appeal was not moot. Or, even if the appeal was technically moot, the "capable of repetition, yet evading review" exception should have been applied. That this Court is now poised to address partisan gerrymandering in *Vieth* highlights the errors in application of the mootness doctrine made by the Court of Appeals.

An appeal is not moot where "a court can fashion some form of meaningful relief," *Church of Scientology of California v. United States*, 506 U.S. 9, 12-13 (1992) (emphasis in the original). In *Church of Scientology*, this

Court held that a dispute concerning audio tapes sought by the government was not rendered moot when the state-court clerk, complying with a government summons, released the tapes. In rejecting mootness, this Court reasoned that a court could still fashion meaningful relief by ordering the government to destroy the tapes in vindication of the possessory and privacy interests raised by the appellant.

Here, the Caucus asked the Court of Appeals to order Plaintiffs to destroy the documents produced by the non-party – i.e., the exact remedy that defeated mootness in *Church of Scientology*. The panel distinguished that case, however, because the Caucus, unlike the appellants in *Church of Scientology*, did not claim either a possessory or a privacy interest in the documents released. *See* Appendix A at 9a. The panel's reasoning rests on an impermissibly restrictive interpretation of *Church of Scientology* and an insupportably narrow interpretation of the legislative privilege and the interests it protects.

In *Church of Scientology*, this Court undertook a factual analysis of the specific interests involved. *See* 506 U.S. at 12-13 ("a court can fashion *some* form of meaningful relief in circumstances such as these") (emphasis in italics original; emphasis in underlining added). It did not purport to limit the analysis of whether a court can fashion "some form of meaningful relief" to the specific interests involved in that case. Rather, *Church of Scientology* instructs lower courts to examine whether the remedy of destruction will provide "meaningful relief" in the context of the specific interests raised. The Court of Appeals did not engage in this analysis before dismissing the appeal brought as moot.

Possession and privacy are simply not the interests the Caucus sought to protect by invoking the legislative privilege. Rather, in seeking to quash the subpoena, the Caucus was endeavoring to protect the legislative process and ensure that federal courts would not, by permitting such discovery, authorize an unwarranted intrusion into the internal operations of the General Assembly. While the panel took note of these interests, it failed to recognize that an order requiring Plaintiffs to destroy the documents for the very reason that the privilege prohibited their discovery, would provide "some form of meaningful relief." It was not destruction *per se* that provided the modicum of relief necessary to defeat mootness but destruction ordered because the privilege prohibited discovery. Even if it could be said that destruction would not remedy past distraction or disruption already experienced by the Caucus in connection with the subpoena, *see* Appendix A at 9a, destruction tied to an explicit holding that the privilege prohibited discovery would certainly remedy the risk of intimidation in this case or in other cases wherein a court may order production based on the dangerous and potentially far-reaching ruling rendered in this case.

An appeal which is otherwise moot may be entertained where the issue is "capable of repetition, yet evading review." The "capable of repetition" prong of this exception requires a "reasonable likelihood" that the complaining party will face the same injury again. *See Honig v. Doe*, 484 U.S. 315, 319-320 (1988). If this Court should reverse the decision of the three-judge court in *Vieth* and remand the partisan gerrymandering claim for further proceedings (perhaps in conjunction with a revised or a new standard for assessing claims of partisan gerrymandering), there is a very realistic possibility that the Plaintiffs would seek additional discovery from CMU,

from another similarly-situated non-party, from other legislators or even from Presiding Officers. Such discovery will again implicate the legislative privilege, and the complaining party – i.e., the Caucus – will again assert the privilege to protect the integrity of the legislative process.

The privilege issue is also capable of evading review. Both the Caucus and the Caucus' contractor were non-parties to the original action. The contractor, like virtually every non-party without an interest of its own to protect, will comply with the subpoena rather than risk contempt. The Caucus, as a body uniquely positioned to vindicate the interests protected by the legislative privilege, will be forced to participate in discovery disputes in countless actions challenging the constitutionality of legislation enacted by the General Assembly.

Finally, this Court has recognized that application of the mootness doctrine is disfavored where issues of public importance are involved. *See e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("public interest in having the legality of practices settled, militates against a mootness conclusion"). The legislative privilege operates to protect the legislative process for the good of the people. It also acts as a bulwark of the separation of powers principles embedded in the Constitution. Moreover, as explained above, the issues before the Court in *Vieth* implicate the very framework of the American system of government. This case is not moot and the legal issue presented should be assessed on the merits in conjunction with *Vieth*.

CONCLUSION

For the foregoing reasons, the House Republican Caucus respectfully requests that a writ of *certiorari* issue expeditiously and that this case be consolidated for consideration with *Vieth v. Jubelirer*, No. 02-1580.

Respectfully submitted,

JOHN P. KRILL, JR.
(Counsel of Record)
LINDA J. SHOREY
JULIA M. GLENCER
Counsel for Petitioner

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1580

RICHARD VIETH; NORMA JEAN VIETH; SUSAN FUREY

v.

COMMONWEALTH OF PA; MARK S. SCHWEIKER, In his official capacity as Governor of Pennsylvania; KIM PIZZINGRILLI, In her official capacity as Secretary of the Commonwealth of Pennsylvania; RICHARD FILLING, In his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; ROBERT C. JUBELIRER, In his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; MATTHEW J. RYAN, In his official capacity as Speaker of the Pennsylvania House of Representatives

REPUBLICAN CAUCUS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES (Intervenor in D.C.)

Republican Caucus of the Pennsylvania House of Representatives,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR MIDDLE THE DISTRICT OF PENNSYLVANIA
D.C. Civil No. 01-cv-02439
District Judge: The Honorable Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
April 7, 2003

Before: BECKER*, Chief Judge, BARRY and BRIGHT,** Circuit Judges

(Filed: May 9, 2003)

OPINION

BARRY, Circuit Judge

As a result of the 2000 census, Pennsylvania lost two congressional seats and was required to adopt a redistricting plan. This appeal arises out of a challenge to the General Assembly's first such plan, which was signed

* Judge Becker completed his term as Chief Judge on May 4, 2003.
** The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

into law on January 7, 2002. Appellant, the House Republican Caucus of the Pennsylvania General Assembly ("Caucus"), was permitted to intervene in the underlying case for the limited purpose of supporting a motion to quash a subpoena *duces tecum* served on a third party. After the motion to quash was denied, the Caucus filed this appeal. We will dismiss the appeal as moot.

I.

Plaintiffs, three registered Democrats, sued defendants, the Commonwealth of Pennsylvania and various state officials, alleging that Act 1, the redistricting plan adopted in January of 2002, was unconstitutional. A district court of three judges (Nygaard, C.J.; Rambo and Yohn, D.J.'s) was convened pursuant to 28 U.S.C. § 2284 (a), which provides for such a panel "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284 (a). An order issued setting an expedited discovery schedule and scheduling an evidentiary hearing for March 11, 2002.

On February 8, 2002, plaintiffs' counsel served a subpoena duces tecum on the Custodian of Records of Carnegie Mellon University ("CMU"), seeking the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including request [sic] for maps

> or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

According to plaintiffs, "[t]he purpose of the subpoena was to obtain further evidence supporting the fact, as had been reported in the press and testified to at the Commonwealth Court hearing, that CMU had performed highly sophisticated census analysis that underlies the meanderings of the Congressional boundaries established by Act 1." Plaintiffs' Memorandum of Law in Opposition to Motion to Quash Subpoena or for Protective Order at 1-2.

On February 19, 2002, defendants Lieutenant Governor Robert C. Jubelirer and Speaker of the House of Representatives Matthew J. Ryan (the "Presiding Officers") filed a motion to quash the subpoena or, in the alternative, for a protective order. On February 22, 2002, the Caucus was granted permission to intervene to support the Presiding Officers' motion to quash. That same day, the motion to quash was denied.

The Presiding Officers, along with the Caucus, filed a motion to stay the order denying the motion to quash pending appeal, and the Caucus filed a timely notice of appeal to this Court. On February 25, 2002, CMU produced most of the documents requested and the motion for a stay was subsequently withdrawn.

On March 11th and 12th of 2002, the three-judge panel held an evidentiary hearing and on April 8, 2002 determined that Act 1 violated the dictates of one person-one vote and enjoined its implementation. The panel granted the Pennsylvania General Assembly three weeks to submit a plan that would remedy the constitutional deficiencies it had found.

On April 17, 2002, the General Assembly enacted a revised congressional redistricting plan, Act 34, which the governor signed into law the next day. Act 34 repealed Act 1 and replaced it with Act 34's boundaries. Defendants then petitioned the panel to stay its decision regarding Act 1 and to allow the 2002 congressional elections to proceed under Act 1's boundaries, which the panel agreed to do. As a result, Act 34 was not in effect for the congressional elections that took place in November of 2002. Act 34 is scheduled to govern the next round of congressional elections in November of 2004, however.

Plaintiffs filed a motion challenging Act 34 and seeking to impose remedial districts or hold remedial hearings; defendants subsequently moved for summary judgment. On January 24, 2003, the three-judge panel upheld the new redistricting plan, finding that it satisfied the one person-one vote requirement, that a possible violation of the state constitution did not change the result, and that the plan did not involve illegal gerrymandering. Plaintiffs have appealed that decision to the Supreme Court of the United States.

II.

All that is before us on this appeal is the February 22, 2002 order denying the motion to quash. This appeal is properly before us, despite the fact that a three-judge panel was convened in this case. "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253. The discovery order at issue in this appeal was not, of course, an order granting or denying injunctive relief and so appeal to the Supreme Court would have been inappropriate.[1] As for an appeal to our Court, the Caucus was not required to wait until the case proceeded to judgment before appealing the denial of its motion to quash because the order denying the motion was "a final order as to [it]." In re Grand Jury, 111 F.3d 1066, 1076 (3d Cir. 1997).

We turn, then, to the question of mootness, given that the subpoenaed documents have been produced. Plaintiffs, we note, have declined to participate in this appeal. In a letter to us, dated December 16, 2002, they explained that because the three-judge panel had already issued its decision without the subpoenaed documents having been offered into evidence, the outcome of this appeal would have no impact on them. The Caucus, on the other hand, explained in its letter to us of March 12, 2003 that it wishes to continue

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[1] The Caucus nonetheless appealed the order denying the motion to quash to the Supreme Court. The Court dismissed the appeal or want of jurisdiction.

to pursue this appeal, despite the fact that the underlying case is "over," "because the issue of legislative privilege in connection with non-parties and discovery was one we were encountering in other cases." The Caucus also noted that the case was not actually over, because of the pending Supreme Court appeal.

In the above-mentioned letter and in its brief on appeal, the Caucus makes two arguments as to why this appeal is not moot, and one for why, if it is, an exception to the mootness doctrine should apply. First, the Caucus argues that the case is not moot because conceivably the Supreme Court could reverse the January 24, 2003 order of the three-judge panel and remand for further proceedings. This argument fails because the dispute over the motion to quash centered on the release of documents to plaintiffs, not their evidentiary use. Should the case be remanded, and should a dispute then arise over the evidentiary use of the documents, that dispute will be for the three-judge panel to resolve in the first instance. See In re Federal Grand Jury Proceedings, 89-10 (MIA), 938 F.2d 1578, 1580 (11th Cir. 1991)(holding that attorney-client privilege challenge to attorney's testimony before grand jury was moot as attorney had already testified, and that appeals court could not issue an advisory opinion regarding the admissibility of the testimony at trial).

The Caucus argues, next, that the case is not moot because while it might not be possible for us "to return the parties to the *status quo ante,*" it is still possible to "fashion *some* form of meaningful relief." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12-13 (1992). The availability of even a less-than-fully-satisfactory remedy is sufficient to prevent a case from

being moot. Id. at 13. "Such relief need not have been requested in the pleadings. Rather, 'it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not.'" Reschini v. First Fed. Sav. and Loan Ass'n of Indiana, 46 F.3d 246, 249 (3d Cir. 1995)(quoting Kirby v. United States Dep't of Hous. & Urban Dev., 745 F.2d 204, 207 (3d Cir.1984)).

The Caucus suggests that meaningful relief is still available because we could order plaintiffs to destroy the documents they received from CMU. This is the remedy suggested in Church of Scientology. But that case is quite different from this case. L. Ron Hubbard, founder of the Church of Scientology, was being investigated by the Internal Revenue Service ("IRS"). In connection with the investigation, the IRS served a summons on a state-court clerk seeking the production of, among other things, two tapes of conversations between Church officials and their attorneys. The IRS then commenced a proceeding to enforce the summons, the lower court ordered compliance, and the Church appealed. While the appeal was pending, copies of the tapes were turned over to the IRS. As a result, the Court of Appeals dismissed the appeal as moot. The Supreme Court vacated the dismissal:

> Taxpayers have an obvious possessory interest in their records. When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records. Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the

> Government's continued possession of those materials, namely, the affront to the taxpayer's privacy. A person's interest in maintaining the privacy of his "papers and effects" is of sufficient importance to merit constitutional protection....

Church of Scientology, 506 U.S. at 12-13.

The Caucus does not claim to have a possessory interest in the documents retained by CMU and the existence and significance of any privacy interest is at best unclear. "'[U]nlike privileges such as attorney-client, physician-patient, or priest-penitent, the purpose of which is to prevent disclosures which would tend to inhibit the development of socially desirable confidential relationships, the Speech or Debate privilege is at its core a *use privilege*.'" Gov't of the Virgin Islands v. Lee, 775 F.2d 514, 523 (3d Cir. 1985)(quoting In re Grand Jury (Intervenor A), 587 F.2d 589, 596 (3d Cir. 1978)). See also Powell v. Ridge, 247 F.3d 520, 524 (3d Cir. 2001)(noting that legislative immunity is not "bottomed on confidentiality").

Moreover, none or almost none of the purposes of the legislative privilege would be served by ordering destruction of the documents. The primary purpose of the privilege is to "protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S. 501, 507 (1972). The privilege enables legislators to function independently, "without regard to the distractions of private civil litigation or the perils of criminal prosecution." Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995). It prevents "'intimidation of legislators by the Executive and accountability before a possibly hostile

judiciary'" and shields the legislature from delay and disruption. Larsen v. Senate of the Commonwealth of Pa., 152 F.3d 240, 250 (3d Cir. 1998)(quoting Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975)). Here, any threat to the integrity of the legislative process caused by CMU's compliance with the subpoena has already occurred. Destroying the documents would not remedy past delay, distraction, disruption or intimidation or in any other way effectuate meaningful relief.[2]

The Caucus presses on, arguing that even if this case is technically moot, we should nonetheless decide it on the merits because it fits within the "capable of repetition, yet evading review" exception to the mootness doctrine. That exception, however, is limited to cases which have two elements: "(1) the challenged action was in its duration too short to be fully litigated to its cessation or expiration and (2) there is a reasonable likelihood that the same complaining party would be subjected to the same action again." Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001)(citations omitted).

It is not enough to merely conclude, as the Caucus does, that "the issue of legislative immunity in the discovery context" is capable of repetition. As for this case, there is no more than a theoretical possibility that CMU will again be subpoenaed and ordered to produce documents relating to the work it did on the 2000 census.

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[2] We note that the Caucus asserts but does not explain why destruction of the documents would serve as a partial remedy for the harm it has allegedly suffered. If it had offered more in the way of explanation, the calculus might be different.

In any event, if it were to be subpoenaed, there is no reason to believe that review will be evaded.

In sum, we lack jurisdiction over this appeal because it is moot. The appeal will be dismissed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al.,	:	
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' motion to quash the subpoena *duces tecum* served upon the Custodian of Records of Carnegie Mellon University is DENIED.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: February 22, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1580

RICHARD VIETH; NORMA JEAN VIETH; SUSAN FUREY

v.

COMMONWEALTH OF PA; MARK S. SCHWEIKER, In his official capacity as Governor of Pennsylvania; KIM PIZZINGRILLI, In her official capacity as Secretary of the Commonwealth of Pennsylvania; RICHARD FILLING, In his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; ROBERT C. JUBELIRER, In his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; MATTHEW J. RYAN, In his official capacity as Speaker of the Pennsylvania House of Representatives

REPUBLICAN CAUCUS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES (Intervenor in D.C.)

Republican Caucus of the Pennsylvania House of Representatives,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR MIDDLE THE DISTRICT OF PENNSYLVANIA
D.C. Civil No. 01-cv-02439
District Judge: The Honorable Sylvia H. Rambo

Present: SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, and BECKER,* Circuit Judges, and BRIGHT,**

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: June 12, 2003

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* Judge Becker completed his term as Chief Judge on May 4, 2003. Vote is limited to panel rehearing only.

** The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation. Vote is limited to panel rehearing only.